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In the Supreme Court of the United States

OCTOBER TERM, 1964

JAMES A. PETERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–5a) has not yet been officially reported. The district court wrote no opinion.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1964 (Pet. 7a), and a petition for rehearing was denied on November 17, 1964 (Pet. 6a). The petition for a writ of certiorari was filed on December 17, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district judge applied the proper standard of willfulness in determining petitioner's guilt.

2. Whether the district judge properly weighed the reputation evidence adduced by petitioner.

3. Whether the district judge improperly relied upon evidence outside of the record.

4. Whether the district judge erroneously shifted the burden of proof to petitioner.

STATUTE INVOLVED

Section 7201 of the Internal Revenue Code of 1954 provides:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

On March 13, 1963 (R. 1),[1] a five-count indictment (R. 3–6) was returned in the United States District Court for the Northern District of Indiana, charging petitioner with having willfully attempted to evade

[1] "R." refers to the appendix to petitioner's brief filed in the court of appeals.

and defeat a large portion of his and his wife's income taxes for the years 1956 through 1960 by filing a false and fraudulent return in each of those years,[2] in violation of Section 7201 of the Internal Revenue Code of 1954. A jury having been waived, the court found petitioner guilty on all five counts and sentenced him to two years' imprisonment, a fine of $7,500 plus costs, and probation for a period of three years to begin upon his release from prison (R. 284–285).

The government proved petitioner's underreporting of income and understatement of taxes by showing his net worth plus nondeductible expenditures. The correctness of the government's net worth statement, exclusive of cash on hand, was stipulated to (R. 16–17, 248–258) and the proof disclosed substantial expenditures, particularly for real estate (R. 248–249, 250–253) and automobiles (R. 249, 255). Taken together, this evidence showed that petitioner's net income was approximately the same as that alleged in the indictment (R. 265). The understated tax liabilities on this unreported income totalled $31,469.42 for the five indictment years (R. 109–111, 266). Peti-

[2] The indictment alleged the following unreported income and understated taxes (R. 3–6):

Count	Year	Unreported income	Understated tax
I	1956	$21,331.33	$9,294.44
II	1957	24,971.60	11,070.25
III	1958	5,762.33	2,125.25
IV	1959	9,845.92	3,888.81
V	1960	19,313.09	9,320.99
		81,224.27	35,699.72

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tioner does not dispute the tax liability, and he paid the amount of understated taxes alleged in the indictment on August 19, 1963 (R. 259–262), just slightly more than five months after the indictment was returned against him.

Petitioner is a professional gambler, and has operated a lotter at various times since 1951 (R. 153, 162–165, 16 -170, 176). His income tax returns were prepared in the indictment years by a certified public accountant named Ralph Richard Collins from information supplied by petitioner and his bookkeeper, Katherine Morris (R. 20–26). Katherine Morris kept the books for all of petitioner's businesses, including real estate, gambling, and the Calumet Package Liquor Store (R. 76). Petitioner gave her, on slips of paper, the figures to be entered in the books concerning his gambling income, and these slips were destroyed after the information was entered (R. 77–81). The accountant never examined the books, but merely had his staff transcribe the information for use in preparing the tax returns (R. 22).

During the indictment years, petitioner used nominees (his brother and a cousin) to conceal his ownership of the liquor store (R. 27–34, 36, 44-45, 62–73, 158–160). The income from this store was reported by the nominees and the taxes were paid in their names (R. 27–34, 158–160).[3] The accountant

[3] Most of the difference between the amount of unreported taxes alleged in the indictment and that proved by the evidence is attributed to credits made at the trial for the amount of taxes paid in the names of the nominees for the Calumet Package Liquor Store in these years (R. 44, 114–115, 266).

was never told of petitioner's ownership of the liquor store during the indictment years, and, at petitioner's request, he prepared the nominees' income tax returns in which the liquor store income was reported (R. 27–34, 36, 62).

The government's proof of net worth allowed $16,000 cash on hand for each year (R. 34–35, 51, 265). During the investigation petitioner was asked about cash on hand (R. 34). He told the agents that he kept fifteen to seventeen thousand dollars as his gambling fund, but he denied having any other substantial cash (R. 34–35, 138–141). Petitioner told the agents that he "invested every dime * * * [he] got" (R. 139), and so he never accumulated any large amounts of cash (R. 139–140).

In March 1962, after the investigation was completed, petitioner and his representatives met with representatives from the Service, and the government's net worth statement was discussed (R. 36–37). After this conference petitioner's accountant explained to him that, if it be assumed that petitioner started with no cash on hand, it would be difficult to account for the assets he acquired during the indictment years if his only source of funds was the taxable income he had reported (R. 39–41). Petitioner said that he had received no gifts or bequests, and that he had no cash on hand except for his working fund (R. 40–41).

Petitioner's attorney then told the accountant to determine exactly what petitioner's net worth amounted to for each of the subject years (R. 54–55).

The accountant's initial determination indicated a net worth increase of $13,000, but a later one showed an increase of $50,000 (R. 55). This latter figure was discussed with petitioner by his attorney and his accountant (R. 55–56). At that time petitioner still did not mention additional cash but in July, 1962, petitioner told his representatives that he had had a cash hoard amounting to between $50,000 and $60,000 (R. 41, 56). Katherine Morris, petitioner's bookkeeper, also informed the accountant that she had seen and counted cash amounting to $60,000 (R. 56–57).

Both petitioner and his bookkeeper testified at the trial that this cash hoard existed in 1954 (R. 83–85, 153–154, 170–172). Petitioner admitted having borrowed money during years when he allegedly had this cash or was accumulating it (R. 171–172). Petitioner's bookkeeper admitted having told the special agent that there was no cash hoard, but claimed that this had been an untruthful answer (R. 83). Petitioner's accountant testified that, in his expert opinion, based upon the income figures given him by petitioner to prepare his income tax returns for 1953, 1954 and 1955, petitioner could not have accumulated a cash hoard in those years (R. 57–58). A reconstruction of petitioner's maximum earnings over the years from his tax returns showed that these earnings for the years 1935 through 1955 could at most have totalled only $66,942.11 (R. 94–96, 264).

The government's evidence showed that petitioner never maintained a checking account, and that he dealt solely in cash (R. 42, 81).

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 8-11) that the district judge applied the wrong legal test of willfulness. In his request for special findings of fact, petitioner asked the court to state the "legal definition of willfulness" which it was applying (R. 269). In both his special findings (R. 274) and his oral opinion (R. 196), the district judge stated that he used the legal test set forth in *United States* v. *Martell*, 199 F. 2d 670, 672 (C.A. 3):

> Willfulness is * * * best defined as a state of mind of the taxpayer wherein he is fully aware of the existence of a tax obligation to the government which he seeks to conceal. A willful evasion of the tax requires an intentional act or omission as compared to an accidental or inadvertent one. It also requires a specific wrongful intent to conceal an obligation known to exist, as compared to a genuine misunderstanding of what the law requires or a bona fide belief that certain receipts are not taxable.

Petitioner cannot quarrel with this definition, which his counsel cited to the trial judge (R. 196).

The evidence of willfulness adduced by the Government in the case at bar clearly meets this standard. There was uncontested "evidence of a consistent pattern of underreporting large amounts of income, and of the failure on * * * [petitioner's] part to include all of * * * [his] income in * * * [his] books and records."[4] *Holland* v. *United States*, 348 U.S. 121,

[4] Since petitioner's records were kept in a manner which made it impossible to verify them (R. 21, 22, 25–26, 78, 197, 271–272), their evidentiary value was no better than petitioner's credibility, which the court found to be "on a very low plane" and "not worthy of much credence" (R. 199, 272).

139. He used nominees to conceal his ownership of the package liquor store.[5] Cf. *United States* v. *Holovachka,* 314 F. 2d 345, 358 (C.A. 7), certiorari denied, 374 U.S. 809. He invented a fictitious cash hoard after the conclusion of the investigation. Finally, he did not maintain a checking account and dealt solely in cash. Cf. *United States* v. *Holovachka, supra.*

Petitioner's argument is based solely on the fact that one of the trial court's specific findings was that he had been "willfully negligent" in keeping his books and reporting his income (R. 273). Use of the word "negligent" in a charge to a jury might justify reversal, even though the charge taken as a whole was not erroneous, since there is no way of telling whether the jury improperly relied on this particular portion of the charge. Here, however, the trial was by the court. It is clear from the other findings (R. 269-274) that what the trial court meant was that petitioner had willfully kept inaccurate records and had willfully omitted a large part of his income from his returns, all with the intent of evading taxes which he knew to be due and owing. Thus, the court found that petitioner had willfully, not negligently, evaded taxes and this finding was sufficient under the statute. The cases upon which petitioner relies (*Wilson* v.

[5] Even if petitioner's principal purpose in doing this was to evade the Indiana law prohibiting professional gamblers from holding liquor licenses (R. 159), it still shows willfulness, for it was "conduct, the likely effect of which would be to mislead or conceal * * * [and] [i]f the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." *Spies* v. *United States*, 317 U.S. 492, 499.

United States, 250 F. 2d 312 (C.A. 9), and *United States* v. *Palermo,* 259 F. 2d 872 (C.A. 3)) are inapposite for in each the trial judge appeared to equate gross negligence with willfulness.

2. Petitioner's contention (Pet. 11–13) that the court did not give proper weight to the evidence concerning his reputation is frivolous. We submit it is obvious from the quoted words themselves (Pet. 11–12) that the court was merely stating the reasons why it did not feel that this evidence was strong enough to overcome the overwhelming evidence of guilt that was introduced by the government. The cases upon which petitioner relies (Pet. 12–13) hold only that the trier of fact should consider reputation evidence, as the court did here, not that such evidence *must* be believed and *requires* an acquittal.

3. Equally without basis is petitioner's contention (Pet. 13–15) that the trial court's guilty verdict was based upon evidence not in the record. The only disputed issue presented at the trial was willfulness. In answer to petitioner's request for a special finding as to what facts the court felt proved willfulness, the court answered (R. 271–272):

> 8. The facts and circumstances most convincing to the Court are that the defendant, although he employed a competent part-time bookkeeper, kept only such records as he thought necessary to satisfy the government under the requirements of the gambling tax act and these records were kept in such a way that they could not be verified; that when interviewed early in the investigation he as-

serted that he had no cash hoard at the beginning of the period but subsequently reported and testified at the trial that he had $60,000 in cash at the beginning of the period; at the same time he testified to income for the years prior to 1956 which could not possibly have resulted in an accumulation of a cash hoard prior to that time. His story relative to the ownership and operation of a package liquor store demonstrated either a deliberate attempt to avoid income tax liability or to circumvent the Indiana laws prohibiting the operation of liquor stores by a professional gambler, either of which purposes demonstrates a willful intent to circumvent the laws and places defendant's credibility on a very low plane; the fact that even though he admittedly handled very large sums of money he had no bank account but handled all of his transactions in cash which he kept mostly in an office safe; the fact that he kept "a little black book," in which he recorded his personal gambling income for certain years which he dutifully reported for those years but had no such records or made no such reports for others, strongly contradicts his only explanation for the so-called cash hoard because if he had such a hoard he had not reported it for tax purposes while his records of such transactions in other years indicated that he knew that such income had to be reported for income tax purposes so if he had accumulated a cash hoard from personal gambling he had willfully and deliberately failed to report it for tax purposes, and finally, the defendant's complete inability to make any rea-

> sonable explanation for the large discrepancy between his admitted net worth and the amount reported for income tax purposes in any of the years covered by the indictment.

This finding makes clear that the judge based his determination of willfulness solely on evidence in the record. Petitioner relies (Pet. 13–14) on a relatively insignificant comment in the oral opinion that the uncanny consistency of wins and losses shown on petitioner's books indicated that the books were not accurate. The trier of fact may of course draw such inferences from the evidence as to its credibility.

4. There is no substance to petitioner's final contention (Pet. 15–18) that the court shifted the burden of proof to him. As the quotation above shows, the court enumerated the many factors showing petitioner's willfulness before it commented upon his failure to give a reasonable explanation for the great disparity between his admitted net worth increases and his reported income. Thus, it is clear that the court was not shifting the burden of proof, but was merely restating this Court's long-established legal principle that, in all criminal prosecutions, "[o]nce the Government has established its case, the defendant remains quiet at his peril".[6] *Holland* v. *United States*, 348 U.S. 121, 138–139; *Yee Hem* v. *United States*, 268 U.S. 178, 185.

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[6] It might be noted that in the instant case the defendant took the even more perilous course of taking the stand and, as the court found (R. 199, 272), testifying untruthfully.

CONCLUSION

For the reasons set forth above, we respectfully submit that the petition for a writ of certiorari should be denied.

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